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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967
No. 68

DENNIS MANAFORD WHITNEY,
Petitioner,
v.
THE STATE OF FLORIDA,
Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA,

---

THIRD DISTRICT
RESPONDENT'S BRIEF

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OPINION BELOW

The Opinion of the Third District Court of Appeal, printed at page 464 of the record, is reported at 184 So.2d 207.

The Opinion of the Supreme Court of the State of Florida, printed at page 478 of the record, is reported at 192 So.2d 490.

JURISDICTION

The Petition for Writ of Certiorari was granted on March 20, 1967.

QUESTIONS PRESENTED

I

WHETHER IT IS A DENIAL OF DUE PROCESS FOR THE STATE TO DENY A POST-CONVICTION EVIDENTIARY HEARING IN A CAPITAL CASE MERELY BECAUSE PETITIONER HAS ALLEGED THAT EXTENSIVE PUBLICATION OF HIS TELEVISED EXTRA-JUDICIAL CONFESSION, TOGETHER WITH OTHER PREJUDICIAL PUBLICITY, DEPRIVED HIM OF A FAIR TRIAL ON THE QUESTION OF WHETHER THE JURY WOULD RECOMMEND MERCY WHEN THE RECORD CONCLUSIVELY REFUTES SAID ALLEGATION?

II

WHETHER THE PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COURT-APPOINTED COUNSEL REFUSED TO REQUEST A CHANGE OF VENUE THOUGH REQUESTED TO DO SO BY THE PETITIONER?

STATEMENT OF THE CASE

Petitioner filed a Motion to Vacate Judgment and Sentence pursuant to Florida's Criminal Procedure Rule No. 1. A copy of said Petition and a

copy of Florida Criminal Procedure Rule No. 1 are contained in the Appendix to the petitioner's brief. Florida Criminal Procedure Rule No. 1 is almost identical to Title 28, USC, Section 2255. In this Petition, it was alleged as follows:

> "3. Petitioner's arrest, detention, pre-trial proceedings, and trial, received widespread adverse publicity by newspapers, radio and television, including broadcasts and telecast of taperecorded confessions made by the Petitioner to law enforcement agencies, to such an extent that such publicity prevented the selection of a fair and impartial jury on the question of whether the jury would recommend mercy for Petitioner in their verdict." (418)

The record before the Circuit Court, which was presided over by the same Circuit Court Judge who had presided over petitioner's trial, showed that there were one hundred and fifty veniremen from which to select a jury (68-70) (430-432). Petitioner exercised only seven peremptory challenges (71-73) (433-435). Under Section 913.08 (1), Florida Statutes, petitioner was afforded ten peremptory challenges. A jury was selected after forty-eight veniremen were examined (71-73) (433-435).

Of the twelve jurors sworn to try the cause, all but one, Mrs. Tauber, answered individually that they had not read, heard, nor seen anything which would preclude them from giving petitioner a fair

and impartial trial and that their minds were in such a state that they could base their verdict solely upon the evidence. Mrs. Tauber was not individually questioned in this regard. Nevertheless, the jury was polled on two occasions as to the existence of a fixed opinion (233, 285), and on one occasion as to whether they would be influenced by anything outside of the case (291). They collectively answered they had no fixed opinion and would not be so influenced. Mrs. Tauber was a member of the prospective panel each time the jury was polled.

During the *voir dire* examination, the State Attorney repeatedly admonished the prospective jurors both collectively and individually that they could not be influenced by anything they had read, heard, or seen in the news media (187) (App 1), (204) (App 2, 3).

Prospective jurors Harmon (191) (App 1), Stein (198) (App 2), Duncan (213) (App 3, 4), Fields (218) (App 4), O'Shaughnessy (235) (App 7, 8), Schley (243, 244) (App 8), Zenere (255) (App 9), Mitchell (271) (App 10), Rosner (288) (App 16) indicated that they woud base their verdicts solely on the evidence.

Prospective jurors Naylor (194) (App 2), Duncan (213) (App 3, 4), Schley (243, 244) (App 8), Zenere (255) (App 9), Rosner (288) (App 16) stated that they had not seen, heard, nor read anything in the news media which would prevent them from giving petitioner a fair and impartial trial.

Prospective jurors Glickman (211) (App 3) and Fields (218) (App 4) answered in the affirmative the question of whether, in spite of what they might have seen, heard, or read, they could give petitioner a fair and impartial trial. It is to be noted that they were not asked whether they had seen, heard, or read anything which would prevent their giving petitioner a fair and impartial trial. Prospective jurors Moss (231) (App 5), Naylor (231) (App 5), (233) (App 7), Mendheim (231) (App 5), Schley (249) (App 8, 9), Kaitz (249) (App 9), O'Shaughnessy (249) (App 9), (288, 289) (App 17), Mitchell (271, 272) (App 10), Nance (284, 285) (App 14, 15) Rosner (288) (App 16) stated that they had not formed any opinion as to petitioner's guilt or innocence.

Prospective jurors Duncan (213) (App 3, 4) and Mendheim (232) (App 5, 6) knew something of other cases against the petitioner. However, Mr. Duncan had read only the headlines and not the details of this particular case. Mr. Mendheim stated that he had formed no opinion "because I haven't heard no testimony yet." (232) (App 6).

The record also reflects that petitioner was successful in removing any prospective juror he challenged.

It is significant that other than Mr. Gheer and Mr. Baro, no veniremen indicated any pre-formed opinion as to guilt or innocence, nothing more than a superficial knowledge of the crimes charged against petitioner, and nothing more than a passing interest in the case. These two indicated that they

had a preconceived opinion as to petitioner's guilt or innocence. Gheer was a newspaper stereotyper for the Miami Daily News (275) and admitted that he had formed and expressed an opinion as to guilt or innocence (276-278) (See App 11-14). Mr. Baro volunteered the information that in his business as a barber he discussed the case every day and had formed an opinion as to guilt or innocence, which could not be swayed by the evidence (286) (App 15, 16).

Petitioner also alleged in his Motion to Vacate as follows:

"6. Trial counsel for the Petitioner, without authority from the Petitioner, or other justification;

a) Refused to ask the Court for a change of venue though requested to do so by the Petitioner." (418)

The record before the Circuit Court reflected as follows:

"Q. You helped select the jury, didn't you?

A. I was present.

Q. You helped select it didn't you?

A. Yes, sir, I asked particularly that one juror be left on and they left him on.

Q. You asked particularly that a Negro be excluded didn't you, — I am not picking on a Negro, I am just trying to recall something to your memory?

A. No, sir.

Q. You didn't ask that anybody be excused?

A. I definitely did not ask that a Negro be

excused.

Q. Throughout the selection of the jury they were talking to you, weren't they about anyone on that jury you didn't like or —

A. Yes, sir, there was one on there I didn't like, and they thought he should be left on, so I left him on.

Q. Throughout this discussion with you, there was one paramount question, one thing involved, and that involved capital punishment, the electric chair, didn't it? They were trying to select people as Judge Goldman told you at least seven out of that twelve that would vote for you to give you mercy, didn't you all talk about that throughout this proceeding?

A. They were talking about how the jurors might feel about capital punishment, yes." (361-362)

The Record also reflects that petitioner was consulted by his attorneys with respect to trial strategy. See the Transcript of Testimony taken before the Honorable Lamar Warren, as Commissioner of the Supreme Court of Florida (306-411).

The trial court denied petitioner's Motion to Vacate on the ground:

"That the files and records of this cause conclusively show that the defendant has been accorded a full measure of due process and is not entitled to the relief sought." (460-461)

Petitioner perfected an appeal to the District Court of Appeal of Florida, Third District. That Court

held as follows with respect to the issue of adverse pre-trial publicity:

> "As to the first reason, lack of due process of law because of excessive publicity, see: Simpson v. State, Fla. App. 1964, 165 So. 2d 195; Sheppard v. Maxwell, 6th Cir. 1965, 346 F. 2d 707. No motion for change of venue was made, nor were the peremptory challenges exhausted in the case sub judice. Therefore, the cases relied upon the appellant (see: Irvin v. Dowd, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2nd 751; Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663) are not applicable." (466)

The opinion of the Third District Court of Appeal does not deal specifically with petitioner's allegation as to the adequacy of representation in the matter of counsel's failure to move for a change of venue. However, the Third District Court of Appeal, in effect, held that the question was **res adjudicata.**

> "As to the fourth reason, failure of counsel to call witnesses, see: Simpson v. State, supra; also Broqkin v. State, Fla. App. 1965, 174 So. 2d 578. Certainly this matter was the subject of attention by the Supreme Court of Florida in the habeas corpus proceeding, because although not specifically raised the court said the following at page 730 of that opinion (Whitney v. Cochran, supra):
>
> ' * * * The record is devoid of any evidence that petitioner's counsel failed to act in good

faith or that they acted in collusion with the state or from any unfaithful motive. Even an obvious tactical blunder, and we do not hold that one was demonstrated here, will seldom support a post conviction assault on a judgment of guilt. Unless such an error makes of the trial and administration of justice a farce or a mockery a conviction will not be disturbed. The record here is devoid of any sufficient showing in this regard . . .'" (466-467)

Petitioner filed a Petition of Writ of Certiorari (469) in the Supreme Court of Florida, which was denied (478). The case is now before this Court on a Writ of Certiorari to the District Court of Appeal of Florida, Third District.

SUMMARY OF ARGUMENT

A. If there was adverse pre-trial publicity, the transcript of the *voir dire* shows that the prospective jurors were not affected by said publicity and that the jury selected was fair and impartial. The record, therefore, affirmatively shows that there was no nexus between the alleged prejudicial pre-trial publicity and the trial, because the *voir dire* transcript reflects that no prejudiced juror found his way into the jury box.

B. Counsel's decision not to move for a change of venue was a good decision based upon the *voir dire* examination and is binding on the defendant irrespective of petitioner's alleged request that

counsel move for a change of venue. This is so because petitioner is not competent to determine whether a favorable jury had been selected and counsel, by reason of training and experience, is.

ARGUMENT

I

IT IS NOT A DENIAL OF DUE PROCESS FOR THE STATE TO DENY A POST-CONVICTION EVIDENTIARY HEARING IN A CAPITAL CASE MERELY BECAUSE PETITIONER HAS ALLEGED THAT EXTENSIVE PUBLICATION OF HIS TELEVISED EXTRAJUDICIAL CONFESSION, TOGETHER WITH OTHER PREJUDICIAL PUBLICITY, DEPRIVED HIM OF A FAIR TRAIL ON THE QUESTION OF WHETHER THE JURY WOULD RECOMMEND MERCY WHEN THE RECORD CONCLUSIVELY REFUTES SAID ALLEGATION.

This Court, through a series of decisions, has promulgated the rule that evidence of pervasive community prejudice is enough for reversal even without the showing of a clear nexus between the community feeling and the jury feeling. The evolution of this rule has been traced in **Pamplin v. Mason**, 364 F. 2d 1, 4-6, (1966, 5th Cir.).

> "Irvin v. Dowd was a habeas proceeding to test the validity of the petitioner's convic-

tion for murder in an Indiana county where intensive publicity had aroused great indignation before the trial. Indiana law allowed only a single change of venue. Since the defendant had already made one transfer, the trial judge denied any further change. The county where the trial was held had 30,000 inhabitants. Justice Clark, for the Supreme Court, found the evidence of prejudice against the defendant 'clear and convincing' : extensive newspaper stories of the defendant's previous criminal record, police line-up identification, lie detector test, negotiations with the prosecutor, and confessions to similar crimes. The trial court had permitted individual examination of prospective jurors; on voir dire, eight of the panel finally selected expressed the opinion that the petitioner was guilty. The Court concluded that the record showed a pattern of deep and bitter prejudice had existed in the community and *that a clear nexus existed between the community prejudice and the possibility of jury prejudice.* The Court reversed and remanded for a new trial.

"More recent Supreme Court cases hold that evidence of pervasive community prejudice is enough for reversal, *even without the showing of a clear nexus between community feeling and jury feeling.* In Rideau v. State of Louisiana, 1963, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, the facts were similar to **Irvin.** The alleged pattern of prejudice in **Rideau** was gen-

erated in large part by the defendant's confessions on a televised interview with the sheriff. The trial court denied a change of venue and challenge for cause of three members of the jury who had seen and heard the damning interview. The Court held that the nation-wide spectacle of the defendant's personally confessing in detail over television to the crimes with which he was later to be charged was in itself sufficient to void his conviction. The Court found it unnecessary to determine from the voir dire transcript whether opinionated jurors actually found their way into the jury box. ' (D)ue process of law in this case required a trial before a jury drawn from a community of people who had not seen and heard Rideau's televised 'interview'." 373 U.S. 727, 83 S.Ct. 1420, 10 L.Ed.2d at 666. Justice Clark dissented, because the Court had established no clear nexus between the television program and prejudice of the jury at the trial two months later. In Turner v. State of Louisiana, 1965, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, the Court reversed the conviction of a defendant where two deputy sheriffs who were principal witnesses for the prosecution had charge of the jury during the three-day trial and fraternized with them outside the courtroom during performance of their duties. Justice Clark again dissented for lack of nexus. It was Justice Clark himself, however, who buried community-jury nexus. Estes v.

State of Texas, 1965, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed. 2d 543. Speaking for the majority, Justice Clark held that televising portions of a state criminal trial *in itself* constitutes a denial of due process. He looked back to Chief Justice Taft in Tumey v. State of Ohio, 1927, 273 U.S. 510, 532, 47 S.Ct. 437, 71 L.Ed. 749, 758, for the sweeping general rule that:

'Every procedure which would offer a *possible* temptation to the average man * * * to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter proc process of law.'

381 U.S. at 543, 85 S.Ct. at 1633. (Emphasis in original quotation.)

"Justice Clark noted that **Estes**, like **Rideau** and **Turner**, marks a departure from Stroble v. State of California, 1952, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872 and Irvin v. Dowd, in both of which the Court had made a careful examination of the facts to determine whether actual jury prejudice resulted. In **Estes**, as in **Rideau** and **Turner**, the Court found the probability of prejudice inherent in the obnoxious practice: 'the circumstances were held to be inherently suspect.' 381 U.S. at 544, 85 S.Ct. at 1633, 14 L.Ed.2d at 551. This term in Sheppard v. Maxwell, 1966, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600, the Court reversed still another conviction because of 'inherently preju-

dicial publicity which saturated the community * * * and disruptive influences in the courtroom'. 384 U.S. at 363, 86 S.Ct. at 1522, 16 L.Ed.2d at 621.

"In this case, therefore, we apply the **Irvin** holding with the gloss of **Rideau, Estes** and **Sheppard.** The test is no longer whether prejudice found its way into the jury box at the trial, as the Texas court stated in the petitioner's appeal. Mason v. State, Tex.Crim.App. 1964, 375 S.W.2d 916. As we read the Supreme Court cases, the test is: Where outside influences affecting the community's climate of opinion as to a defendant are inherently suspect, the resulting probability of unfairness requires suitable procedural safeguards, such as a change of venue, to assure a fair and impartial trial. As the Supreme Court stated in Sheppard v. Maxwell:

'Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. * * * (W)here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another

> county not so permeated with publicity. * * * If publicity during the proceeding threatens the fairness of the trial, a new trial should be ordered.'
>
> 384 U.S. at 362, 86 S.Ct. at 1522, 16 L.Ed. 2d at 620."

Respondent has no quarrel with this rule of law, but contends that the rule has no application to the facts of the instant case. The record does not refute petitioner's allegations of prejudicial pre-trial publicity. On the other hand, the record proves false petitioner's contention of pervasive community prejudice. In other words, while respondent is unable to disprove the publicity, it is respondent's contention, nevertheless, that the record shows that the prospective jurors were not affected by the publicity.

The converse of the rule enunciated in **Rideau v. Louisiana**, 373 U.S. 723, (1963), **Turner v. Louisiana**, 379 U.S. 466, (1965), and **Sheppard v. Maxwell**, 384 U.S. 333, (1966), must be that no presumption of a denial of due process will be indulged, despite the existence of inherently suspect outside influences capable of affecting the community's climate of opinion as to a defendant, if the record of the *voir dire* shows that the jury had no preconceived opinion as to defendant's guilt and could reach a verdict based solely on the evidence. Where it affirmatively appears from the record that no nexus exists between the outside circumstances—however gross, however suspect—and the trial, a finding of prejudice is unwarranted. For example, suppose that the

record in **Rideau v. Louisiana**, supra, had shown from the *voir dire* transcript that no opinionated jurors found their way into the jury box. Would this Court have found a denial of due process? Of course not. Yet that is the situation in the case at bar.

The *voir dire* examination of jurors furnishes the most reliable evidence of whether any prejudice exists, **Butler v. United States**, 351 F.2d. 14 (1965, 8th Cir.). The mere presence of adverse pre-trial publicity does not, *per se*, establish proof of prejudice or necessarily establish that a defendant would be unable to obtain a fair trial within the community, **Blumenfield v. United States**, 284 F.2d. 46 at 51 (1960, 8th Cir.). The proper occasion for a determination of whether an accused can obtain a fair trial in spite of adverse pre-trial publicity is upon the *voir dire* examination, **Blumenfield v. United States**, supra.

While in **Rideau v. Louisiana**, supra, the Court found it unnecessary to determine from the *voir dire* transcript whether opinionated jurors actually found their way into the jury box, the Court did not suggest that it would disregard the *voir dire* transcript where there was pre-trial publicity which was inherently prejudicial. The effect of these cases is merely to relieve the defendant of the burden of showing a nexus between the prejudicial publicity and the trial. Nevertheless, if the *voir dire* transcript affirmatively shows that there was no nexus, then there is no necessity for a new trial. The Court

is, therefore, urged to reject petitioner's argument that he could not receive a fair trial because of prejudicial pre-trail publicity and turn to the question of whether he did receive a fair trial, **Welch v. United States**, 371 F.2d. 287 (1966, 10th Cir.).

An examination of the *voir dire* reflects that the veniremen had only a cursory knowledge of the crimes attributed to the petitioner. Of the forty-eight veniremen examined, only two had formed any opinion as to petitioner's guilt or innocence. Formulation of a fixed opinion by these two individuals, a barber, who discussed the case daily in his barber shop, and a newspaper stereotyper, who was constantly exposed to news articlces dealing with the petitioner, was an occupational hazard. With the exception of these two, all the veniremen examined stated that they had not been exposed to anything in the news media which would prevent them from giving the petitioner a fair and impartial trial, and that in spite of what they might have seen, heard, or read, they could give the petitioner a fair and impartial trial. All of these veniremen answered that they had no fixed opinion as to guilt or innocence, and that they would not be influenced by anything outside the case.

Petitioner was successful in removing any prospective juror he challenged. Of the one hundred and fifty veniremen, only forty-eight were examined, before the jury was impaneled. Petitioner exercised only seven of ten peremptory challenges.

Turning now to the jurors actually selected, all

but one answered individually that they had not read, heard, nor seen anything which would preclude them from giving petitioner a fair and impartial trial, and that their minds were in such a state that they could base their verdict solely upon the evidence. All of the jurors were polled on two occasions as to the existence of a fixed opinion, and on one occasion as to whether they would be influenced by anything outside of the case. They collectively answered that they had no fixed opinion and would not be so influenced. Mrs. Tauber, the juror who was not individually questioned as to her exposure to publicity which would preclude her from giving petitioner a fair and impartial trial, was among those polled and among those who collectively answered showing a lack of prejudice against the petitioner.

It is respectfully submitted that unless this Court is prepared to hold that *voir dire* examination is no longer a useful tool in selecting a fair and impartial jury and that the transcript of a *voir dire* examination is no longer a reliable gauge with which to determine whether a defendant received a trial by a fair and impartial jury, the record in this cause is sufficient to show that petitioner was accorded a full measure of due process despite the existence of any alleged adverse pre-trial publicity.

This case is controlled by **Beck v. Washington**, 369 U.S. 541 (1962) The similarities between the case at bar and **Beck**, supra, are striking. In **Beck** fifty-two veniremen were examined. In the case at

bar, forty-eight veniremen were examined. In **Beck**, six veniremen suggested that they might have been biased or might have formed an opinion, and eight admitted bias or a pre-formed opinion as to petitioner's guilt. In the case at bar, only two veniremen admitted to having formed any opinion at all. **Beck** was accorded six peremptory challenges. Petitioner was given ten peremptory challenges. Beck exercised all six of his peremptory challenges. Petitioner exercised only seven of his peremptory challenges. Petitioner was successful in removing any prospective juror that he challenged. In **Beck**, athough most of the persons selected for the trial jury had been exposed to some publicity, each indicated that he was not biased, that he had formed no opinion as to petitioner's guilt which would require evidence to remove, and that he would enter the trial with an open mind disregarding anything he had read about the case. The jurors selected in the case at bar testified to the same effect. Perhaps the only difference between the case at bar and **Beck** is that most of the persons selected for the trial jury in the case at bar seem to have been exposed only superficially to the pre-trial publicity.

In **Beck**, the Court held as follows:

> " * * * The fact that petitioner did not challenge for cause any of the jurors so selected is strong evidence that he was convinced the jurors were not biased and had not formed any opinions to his guilt. * * * "

The *voir dire* transcript in the instant matter also

reflects that petitioner did not challenge for cause any of the jurors selected. This is strong evidence that he and his attorneys were convinced that the jurors were not biased and had not formed any opinions as to his guilt. A study of the *voir dire* in the case at bar indicates clearly that each juror's qualifications as to impartiality far exceeded the minimum standards that this Court has established.

POINT II

THE PETITIONER WAS NOT DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THAT HIS COURT-APPOINTED COUNSEL REFUSED TO REQUEST A CHANGE OF VENUE THOUGH REQUESTED TO DO SO BY THE PETITIONER.

In petitioner's Motion to Vacate, he alleged that he was denied the effective assistance of counsel in that his attorneys refused to move for a change of venue, although requested to do so by the petitioner. This, despite the fact that petitioner, in his habeas corpus hearing, testified that he was consulted by his counsel as to the selection or exclusion of various prospective jurors (361, 362).

Petitioner cites **Anders v. California**, 386 U.S. 738 (1967), for the proposition that an indigent defendant is entitled to advocacy of the quality which a non-indigent defendant is able to obtain. Petitioner then suggests that to assure this equality of

representation court-appointed counsel is obligated to either allow the client to control decisions as to pre-trial strategy, or advise the trial court as to the conflict with as full an explanation as possible without prejudice to the client. Petitioner then suggests that the Court should rule whether counsel should withdraw. Petitioner ignores the fact that this proposal places the trial court in the role of an additional defense counsel, inasmuch as it is requested to base its ruling on the wisdom of the stratagems sought to be employed by the attorney and the client.

Petitioner also contends on page nineteen of his brief that an indigent defendant is disadvantaged as compared with a non-indigent defendant in that the latter, if he disagrees with counsel's pre-trial strategy, may threaten to discharge his attorney, while the former may not. This argument is absurd. If the defendant is dissatisfied with his counsel's position, he is not without remedy. He can discharge his counsel and the Court can, in its discretion, if counsel is appointed, appoint new counsel, **Nelson v. People of the State of California**, 346 F.2d 73 at 81, Footnote 9, (1965, 9th Cir.).

Respondent does not regard the factual situation in the instant matter as being a waiver of petitioner's constitutional rights. It is respondent's position that because the jury was, in fact, fair and impartial, petitioner's constitutional rights were preserved

by his counsel, and, consequently, there was no waiver.

It is respondent's position that the decision of whether to move for a change of venue or whether to accept a particular jury is one to be made by counsel and is binding on the defendant even if he disagrees with counsel's strategy. It is also respondent's contention, although not necessary to the facts of this case, that mistakes of counsel amounting to bad judgment or inadvertence or carelessness are also binding on the defendant, except in cases where counsel is incompetent or corrupt.

In **Henry v. Mississippi**, 379 U.S. 443, (1965) this Court held:

> "'The evidence suggests reasons for a strategic move. * * * If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here. Although trial strategy adopted by counsel without prior consultation with an accused will not, *where the circumstances are exceptional*, preclude the accused from asserting constitutional claims, see Whitus v. Balkcom, 333 F2d 496 (5th Cir 1964), we think that the deliberate bypassing by counsel of the contemporaneous-objection rule as a part of trial strategy would have that effect in

this case." **Henry v. Mississippi**, supra at 451, 452. (Emphasis supplied)

This holding stands for the proposition that unless the circumstances are exceptional, trial strategy adopted by counsel, without prior consultation with an accused, is binding on the defendant.

Counsel's decision in the instant case was whether to accept a jury based upon *voir dire* examination or to move for a change of venue on the grounds of adverse pre-trial publicity. It is respectfully submitted that this decision is one which can be made only by counsel. This decision, and others concerning trial strategy, must be made by counsel, and not by the defendant, simply because it is counsel, and not the defendant, who knows how best to conduct the defense. Were it otherwise, counsel would be reduced to a mere mouthpiece, and the defendant would be denied the effective assistance of counsel to the same extent as if he had conducted his own defense without the assistance of counsel.

This Court has long recognized the need for the "guiding hand of counsel." In **Powell v. Alabama**, 287 U.S. 45, 68-69, (1932) this Court held that:

> " * * * The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules

of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." **Powell v. Alabama**, supra at 68, 69.

In **Gideon v. Wainwright**, 372 U.S. 335, (1963) this Court held:

". . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machin-

ery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. * * * "

The "guiding hand of counsel" requires more than a mere mouthpiece. It inevitably flows from **Powell** and **Gideon**, supra, that when a defendant has counsel, as petitioner did, it is counsel's decision on a question such as is here involved that must control. Counsel is the manager of the lawsuit; this is of the essence of the adversary system of which we are so proud. In the nature of things, he must be be-

cause he knows how to do the job, and the defendant does not. That is why counsel must be there, **Rhay v. Browder**, 342 F.2d 345 (1965, 9th Cir.). One of the surest ways for counsel to lose a lawsuit is to permit his client to run the trial. Few competent attorneys would accept retainers or appointment to defend criminal cases if they were to have to consult the defendant, and follow his views on every issue of trial strategy that might, often as a matter of hindsight, involve some claim of constitutional right, **Nelson v. People of the State of California**, supra.

That it is counsel's decision which controls is particularly true in the selection of a jury. The art of *voir dire* is learned only in the courtroom. The ability to select a juror favorably disposed towards one's client is often the heart of a litigation. The ablity to recognize an unsuitable juror can only be acquired through many years of trial experience. Whether recognition is made by observing the prospective jurors demeanor or by a feeling in the fingertips.* It is an ability which not even an intelligent layman, much less a seventeen-year old youth, could be expected to have, **Whitus v. Balkcom**, 333 F.2d 496 (1964, 5th Cir.). Would we prefer petitioner's judgment to that of his experienced counsel, and would it be fair to leave to the petitioner the determination of whether to accept the jury based upon the *voir dire* examination or to move for a change of venue. For counsel to have done so would, indeed, have proved his representation inadequate

and ineffective. See the dissent in **Ledbetter v. Warden, Maryland Penitentiary,** 368 F.2d 490 at 496, 497 (1966, 4th Cir.) Thus it is that petitioner's allegation that his counsel refused to move for a change of venue, despite the fact that he had requested such a motion, does not require an evidentiary hearing, **Nelson v. People of the State of California, supra.**

Not only is an evidentiary hearing not required, but such a hearing would be an exercise in futility.

> "What then, would the hearing be about? Would the court take testimony from counsel as to what the real reason was for his doing what he did, and, if it found the reason not satisfactory, proceed to hear a motion [for change of venue], or to retry the case? Would the court take its own testimony as to whether it 'peremptorily' denied a motion never made, or an objection that was dropped, or as to whether its own attitude was such as to justify counsel in 'seeing no point' in proceeding? We do not think that it is the function of a motion under section 2255 or of habeas corpus, following a

*The art of voir dire, TIME, April 7, 1967, Vol. 89, pp. 63, 64.

trial on the merits, to get into this kind of second-guessing. We think that to do so denigrates the essential role that the Sixth Amendment assigns to counsel in the trial of criminal cases, and turns a federal criminal trial, with all the safeguards that it provides for the rights of defendants, into a mere hearing preliminary to a section 2255 motion. The Supreme Court has not told us that this is what we must do, and unless and until it does, we are not for doing it."

. . . . . .

" . . . if we also require counsel, long after the trial, to appear at a post-conviction hearing and be subjected to examination and cross-examination as to why he did what he did, or failed to do what he did not do, and whether his reasons, if he can remember them, were good or bad. Such a procedure places counsel in the unenviable position where, if he can recall his reasons and they are good, he is hurting his former client, and if he can recall his reasons and they are bad, or even not very good, he is impugning his own professional competence. We doubt that many counsel would be willing to go through such a performance more than once, or indeed at all if they could foresee the possibility." **Kuhl v. United States**, 370 F.2d, 20 at 26, 27 (1966, 9th Cir.).

In **U.S. ex rel. Goldsby v. Harpole**, 263 F.2d 71,

(1959), 5th Cir.), it was held:

> " * * * In ordinary procedural matters, the defendant in a criminal case is bound by the acts or nonaction of his counsel. That might extend to the waiver of the objection that Negroes were systematically excluded from the grand jury. In noncapital cases, it might extend to a like waiver as to the petit jury. *It might extend to such a waiver even in capital cases, where the record affirmatively shows that the particular jury was desired by defendant's counsel after conscientious consideration of that course of action which would be best for the client's cause.* Supra at 83. (Emphasis supplied)

If we substitute the possibility that the jury might have been exposed to prejudicial pre-trial publicity for the systematic exclusion of Negroes from the jury lists, **Goldsby**, supra, is squarely on point with the case at bar. Here the record affirmatively shows that the particular jury finally selected was desired by petitioner's counsel after conscientious consideration of the course of action which would be best for petitioner. If petitioner disagreed with counsel's strategy, he is, nevertheless, bound by counsel's decision, **Nelson v. People of the State of California**, supra. As such, petitioner is bound by counsel's decision. That is was a good decision is apparent from the *voir dire*. An examination of the *voir dire* shows

that in the instant case, counsel was convinced, after rather extensive questioning, that a fair and impartial jury had been impaneled. Under such circumstances, a motion for a change of venue would have been inappropriate.

CONCLUSION

It is respectfully submitted that it is not a denial of due process for the State to deny a post-conviction evidentiary hearing in a capital case merely because petitioner has alleged that extensive publication of his televised extrajudicial confession, together with other prejudicial publicity, deprive him of a fair trial on the question of whether the jury would recommend mercy when the record conclusively refutes said allegation, and that the petitioner was not denied the effective assistance of counsel in that his court-appointed counsel refused to request a change of venue though requested to do so by the petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief and Appendix was mailed to the Honorable Richard Kanner, Attorney at Law, 1150 N.W. 14th Street, Miami, Florida, Attorny for petitioner, this 4th day of ~~September~~ October, 1967.

James T. Carlisle

JAMES T. CARLISLE
of Counsel

The following are exerpted from the transcript of the *voir dire* examination of the jury.

Mr. Gerstein: Now, some of you may have read in the newspaper or seen over television or heard something over the radio about this case. Regardless of what you may have heard or read outside of this courtroom, the only thing upon which you can base your verdict in this case on is what comes to you from this witness stand. You cannot be influenced by anything else. That is, the only thing on which you can base your verdict. (187)

* * *

Mr. Gerstein: Do you have any pre-conceived opinion about this case from anything you might have read in the newspaper or seen on the television or heard over the radio? That is, we are trying to get a jury that is fair, impartial to both sides, and we want jurors who will base their verdict only upon what comes from this witness stand and in this courtroom. Do you feel that your mind is in a position and state where you can do that?

Mr. Harmon: Yes, sir. (191)

* * *

Mr. Gerstein: Mr. Naylor, have you read anything about this case in the newspapers, seen anything about it on the television or heard anything about it over the radio which would prevent you from giving both to this defendent, Dennis Whitney, on the one hand and the people of the State of Florida on the other hand a fair and impartial trial?

Mr. Naylor: No, sir, I haven't. (194)

* * *

Mr. Gerstein: Mr. Stein, this case may have had considerable publicity in the newspaper, over the radio and over television. In spite of anything that you may have read or heard about it, you understand, do you not, that your verdict in this case, and the verdict of your fellow jurors, must be based only upon what comes to you from that witness stand, the proof and the evidence as it comes to you from the witness stand. Now, that is the only thing that you can make up your mind on, sir.

Mr. Stein: Yes, sir. (198)

* * *

Mr. Gerstein: This same proposition I want to restate to you. That is, that we are trying to arrive at a fair and impartial jury, one that can be fair both to the defendant, Dennis Whitney, and to the people of the State of Florida. We are not interested in anything that anyone may have read in the newspapers or heard about it on the TV or radio, but the only thing you are to base your verdict, that your verdict can be based on, is what comes to you from the witness stand. That is the purpose of all of these

questions. (203) I think they may seem very personal; but the purpose of all of them is to try to get as fair a jury for both sides, for the defendant and for the State of Florida, that we can possibly get, so it is necessary, you see, to ask these questions. (204)

* * *

Mr. Gerstein: Mr. Glickman, you may have read about this case in the newspapers, seen something about it on the television or heard about it on the radio. In spite of that, we are trying to arrive at a jury that is fair and impartial, and one that will base their verdict in this case upon the evidence as it comes to them from the witness stand, that are in a position to give to this defendant, Dennis Whitney, a fair and impartial trial, and on the other hand, to the people of the State of Florida that same fair and impartial trial.

Is your mind in such a state that you are able to do that, sir?

Mr. Glickman: Yes, sir. (211)

* * *

Mr. Gerstein: Do you know anything about this case from reading about it in the newspapers, seeing anything about it on the television or hearing about it over the radio, such as would prevent you from basing your verdict upon the testimony and evidence as it comes to you from this witness stand?

Mr. Duncan: Not in the relation of this case, sir.

Mr. Gerstein: All right. Don't tell us about anything else. Thank you.

In other words, what we are trying to do is to get a jury that will decide this case based upon what

comes from that witness stand (indicating), and not anything that they may have read or heard or anything else; you understand that?

Mr. Duncan: Yes, sir. (213)

* * *

Mr. Gerstein: Thank you. Mr. Fields, in spite of anything that you may have read in the newspapers, heard over the radio, seen on television about this trial, you must understand the only place the evidence comes to you is from this witness stand, and your mind must be in such an open state that it can give, on the one hand, to Dennis Whitney, and on the other hand, to the people of the State of Florida, *a fair and impartial trial* which both sides are entitled to.

Mr. Fields: Yes.

Mr. Gerstein: You will base your verdict only upon what comes to you from the witness stand?

Mr. Fields: Yes, sir.

(fol. 313) Mr. Gerstein: You will base your verdict only upon what comes to you from the witness stand?

Mr. Fields: That's right. (218)

* * *

Mr. Swan: Have you made up your mind prior to sitting here as to the guilt or innocence of that defendant, Mr. Beach?

Mr. Beach: No, sir, I have not pertaining to this case. Of course, I naturally heard about the other case in Palm Beach, but this case——

Mr. Swan: I am asking you a question. Have you made up your mind as to the guilt or innocence——

Mr. Beach: No, sir. I have not.

Mr. Swan: Not in any respect?

Mr. Beach: No.

Mr. Swan: And you think you can give this man a fair and impartial trial?

Mr. Beach: Yes sir, I do. (223) See (232) (App 7)

* * *

Mr. Swan: Have you read anything about this, Mr. Ducan, this particular case?

Mr. Duncan: No, sir.

Mr. Swan: Have you seen or heard anything about this particular case?

Mr. Duncan: Not any more than what the newspapers said.

Mr. Swan: Have you read what the newspapers said about this?

Mr. Duncan: The headlines of it. I didn't read the details.

Mr. Swan: Mr. Moss, have you ever expressed an opinion as to the guilt or innocence of this defendant to anyone?

Mr. Moss: No, sir, I haven't.

Mr. Swan: On this case, have you, sir, Mr. Naylor.

Mr. Naylor: No, sir.

Mr. Swan: Have you? Excuse me, is it Mendheimer?

Mr. Mendheim: Mendheim.

Mr. Swan: Excuse me. Mendheim. Have you expressed or formed an opinion as to the defendant's guilt or innocence?

Mr. Mendheim: No, I haven't formed an opinion. I just read the papers. (231)

I read where he was tried in Palm Beach.

Mr. Swan: Have you formed an opinion as to this man's guilt?

Mr. Mendheim: No. I form no opinion, because I haven't heard no testimony yet.

Mr. Swan: But what you read or have seen or have heard on television before you came in this courtroom, Mr. Mendheim, is what I am asking you.

Mr. Mendheim: No. I have formed no opinion.

Mr. Swan: This is the situation. Our job, as well as the State, is to pick a fair and impartial juror, one that hasn't any pre-conceived notion as to whether or not this man is guilty or innocent before he ever starts. That is what we want to find out, whether you have expressed an opinion.

Mr. Mendheim: I believe any man is guilty—innocent until proven guilty, if that is what you are trying to ask me.

Mr. Swan: Yes, sir.

Mr. Mendheim: Yes, sir.

Mr. Swan: You have not expressed any opinion to anyone?

Mr. Mendheim: No.

Mr. Swan: As to whether or not this man was guilty or innocent?

Mr. Mendheim: No, sir.

Mr. Swan: Nor have you formed an opinion?

Mr. Mendheim: No, sir.

Mr. Swan: Have you, sir?

Mr. Mendheim: No, sir.

Mr. Swan: You, Mr. Beach?

Mr. Beach: No; as to this particular trial, no, sir.

Mr. Swan: If the Court please, I would like to have Mr. Beach come to the Bench. There seems to be some question here.

The Court: Come up here a minute.

(Thereupon counsel for the respective parties and Mr. Beach approached the Bench and conferred with the Court out of the hearing of the Reporter.)

The Court: All right.

Mr. Swan: Denied?

The Court: Yes. (232) See (233)

Mr. Swan: Have you ever formed or expressed any opinion as to this defendant's guilt?

Mr. Naylor: No, sir.

(Thereupon the remaining jurors were polled, and answered in the negative.)

Mr. Swan: May we have a minute, your Honor?

The Court: Yes.

Mr. Swan: The defendant will excuse Mr. Beach and Mr. Filer. (233)

* * *

Mr. Gerstein: From anything that you have read in the newspapers or seen over the television or heard over the radio, have you a pre-conceived opinion as to the innocence or guilt of this defendant, or are you willing to base your opinion upon what comes to you from this witness stand?

Mr. O'Shaughnessy: Base my opinion on what

the facts are.

Mr. Gerstein: Yes, sir. That is exactly what we want you to do. The purpose of that question is to try to get a juror who is fair and impartial and will not be influenced by any outside evidence that he might have, but only by the evidence that comes to him from this witness stand in this courtroom, and by his Honor's charge as to the law of this State.

Your mind is in a state where you can do that; is it not, sir?

Mr. O'Shaughnessy: That is correct. (235)

* * *

Mr. Gerstein: That is a long time. You may have read considerable about this case or this defendant in the newspaper, heard about him over the radio or seen something about it on television, but regardless of that fact, you must have a juror that will base their verdict in this case only on what they hear from the witness stand in this courtroom, and from what his Honor tells you is the law of the State of Florida. (243)

Now, sir, is your mind in such a state that you can do that, sir?

Mr. Schley: Yes, sir.

Mr. Gerstein: You can afford to give this defendant, Dennis Whitney, a fair and impartial trial which he is entitled to?

Mr. Schley: Yes, sir. (244)

* * *

Mr. Swan: Mr. Schley, have you expressed any

opinion as to the guilt or innocence of this boy?

Mr. Schley: No, sir.

Mr. Swan: I mean prior to coming here today?

Mr. Schley: No, sir.

Mr. Swan: What about you, Mr. Kaitz?

Mr. Kaitz: That's right.

Mr. Swan: Have you, sir?

Mr. Kaitz: No, sir.

Mr. Swan: You have not expressed any opinion as to his guilt or innocence?

Mr. Kaitz: No, sir.

Mr. Swan: Mr. Harris?

Mr. Harris: No, sir.

Mr. Swan: Mr. Reiner?

Mr. Reiner: No, sir.

Mr. Swan: Mr. O'Shaughnessy?

Mr. O'Shaughnessy: None whatsoever. (249)

* * *

Mr. Gerstein: Do you know anything about this case which would prevent you from giving, on the one hand, Dennis Whitney a fair and impartial trial, and on the (254) other hand, to the people of the State of Florida, that same fair and impartial trial?

Mr. Zenere: No, sir.

Mr. Gerstein: In other words, you will be able to base your verdict upon what you hear in this courtroom under oath from that witness stand?

Mr. Zenere: Yes, sir. (255)

* * *

Mr. Gerstein: There has been considerable attention to this case in the press, over the radio and

and over the television. In spite of that, the only thing that you can base your verdict on is what you hear in the courtroom from the witness stand and the charge of his Honor as to the law. We want a jury that will give to this defendant the fair and impartial and just trial to which he is entitled, and one that will base their verdict only upon what they hear from this courtroom and by the same token give to the State of Florida, the people of this State, that same fair and impartial trial.

Is your mind in such a state, sir, that you can do that?

Mr. Mitchell: Yes, sir. (271)

* * *

Mr. Swan: Have you formed or expressed any opinion (271) as to whether or not Dennis Whitney is guilty or innocent at all?

Mr. Mitchell: No, sir.

Mr. Swan: Have you discussed it at all?

Mr. Mitchell: No.

Mr. Swan: Did you read about it in the newspapers?

Mr. Mitchell: Well, naturally, yes, sir.

Mr. Swan: But you, even though you read about it, have formed no opinion from reading about it and being at the gas station, in the gas station business, too?

Mr. Mitchell: Well ——

Mr. Swan: Yes or no?

Mr. Mitchell: No, I don't think so, actually, really.

Mr. Swan: We challenge, your Honor, if the

Court please. The defendant excuses Mr. Mitchell.

The Court: All right. Step down.

(The juror was excused.) (272)

* * *

Mr. Gheer, would you tell me where you live?

Mr. Gheer: 221 Northwest 27th Court.

Mr. Gerstein: And your business or occupation?

Mr. Gheer: Newspaper stereotyper.

Mr. Gerstein: Which paper, sir?

Mr. Gheer: Daily News.

Mr. Swan: What does he do?

Mr. Gheer: Stereotyper.

Mr. Gerstein: Do you happen to know Miss Kelly, a reporter for your newspaper?

Mr. Gheer: I have seen her. (275)

* * *

Mr. Gerstein: So you are now entering this courtroom with an open mind and the position to give a fair trial to Dennis Whitney and to the people of the State of Florida, are you not, sir? (276)

Mr. Gheer: I think so.

Mr. Gerstein: Well, now, regardless of anything that you may have read or heard over the radio or seen on the television, you have got to decide this case based upon only what comes from the witness stand. That is the only fair way to do it and the only way we want you to do it. I don't want you to have any pre-conceived notions of the innocence or opinion of the innocence or guilt of this defendant, regardless of what you might have heard.

We tender the jury.

Mr. Swan: I don't believe the juror answered the

question.

The Court: Have you, by what you have maybe read or seen on television, been influenced and formed an opinion as to the guilt or innocence?

Mr. Gheer: I expect so, from what I have read.

The Court: What was that?

Mr. Swan: He expects so from what he has read.

Mr. Gerstein: That isn't enough.

The Court: What you have read, has it convinced you to the extent that you could not put it aside in your mind (fol. 413) and base your verdict on the evidence as you hear it here in the courtroom and the charge of the Court?

Mr. Gheer: I am not sure.

Mr. Gerstein: May I ask a question, your Honor?

The Court: Go ahead.

Mr. Gerstein: Sir, wouldn't any opinion that you might have formed by something that you might have read or heard or seen, wouldn't it yield to what came from that witness stand under oath?

Mr. Gheer: I think so.

Mr. Goldman: I object to the question, to the form of the question as presented by Mr. Gerstein. He is leading him on, and I think the question calls for a yes or no and not for Mr. Gerstein ——

Mr. Swan: That was a loaded question where he can only answer one way.

The Court: Could you put aside whatever you may have read, heard or seen from any other source, and then base your verdict solely on the evidence from this witness stand?

Mr. Gheer: I think so.

The Court: Well, that is your duty as a juror, to

do that (277) if you can, and you are the only one that knows whether or not you can do that.

Mr. Gheer: I think so.

Mr. Swan: Have you expressed any opinion as to the guilt or innocence of this man? Just yes or no, not what the opinion is.

Mr. Gheer: I imagine I have. We have in the paper at times.

Mr. Swan: And what position in the paper do you hold?

Mr. Gheer: I work in the mechanical end — stereotype.

Mr. Swan: Downstairs?

Mr. Gheer: Yes, sir. Mechanic.

The Court: Whatever opinion you may have had or might have expressed, could you put that aside and forget that and base your verdict on the evidence here?

Mr. Gheer: I believe so.

Mr. Swan: If the Court please, I will challenge the juror for cause.

"I believe so" and knowing is two different things, if the Court please.

The Court: Overruled. (278)

* * *

Mr. Swan: You heard the legal proposition that Mr. Gerstein and I have been discussing as to a reasonable doubt and the presumption of innocence.

Mr. Gheer: Yes, sir.

Mr. Swan: This boy is clothed with the presumption of innocence until the time comes that the State has, by the burden of proof, convinced you by

any reasonable doubt that he is guilty. Then — until then he is still innocent; you understand that?

Mr. Gheer: Yes.

Mr. Swan: If you do have a reasonable doubt as to his guilt, you would vote not guilty, sir?

Mr. Gheer: Yes, sir.

Mr. Swan: You hesitated, Mr. Gheer. Is there something in that question?

Mr. Gheer: No. When you hear something about a case ——

The Court: Speak up.

Mr. Swan: Talk louder, Mr. Gheer.

Mr. Gheer: When you read and hear so much about a case, you pretty near have to form an —— opinion.

Mr. Swan: That is right, and that is what I have asked before. Have you formed an opinion?

Mr. Gheer: I am afraid so.

Mr. Swan: And is that opinion fixed in your mind, as to the guilt or innocence, Mr. Gheer?

Mr. Gheer: I am afraid it is.

The Court: All right. You are excused. Step down.

(The juror was excused.) (280)

* * *

Mr. Swan: Have you formed or expressed an opinion as to the guilt or innocence of this man? (283)

Mr. Nance: I have not. (284)

* * *

Mr. Swan: Have you ever formed or expressed an

opinion as to this boy's guilt or innocence?

Mr. Nance: No, I have not.

Mr. Swan: And you have no fixed opinion?

Mr. Nance: No, I do not.

Mr. Swan: Is that correct with each juror now? You have no fixed opinion?

(Thereupon each juror replied that he had no fixed opinion.) (285)

Mr. Baro: Well, in my business as a barber, we discuss that every day.

Mr. Swan: You mean discuss the case?

Mr. Baro: Yes, sir.

Mr. Swan: Have you formed an opinion?

Mr. Baro: Well, not exactly an opinion of the case.

Mr. Swan: Well, now, as to his guilt or innocence, sir, have you got a fixed opinion as to the guilt or innocence of this defendant? This is the time we have to know, because after you are sworn, it is too late.

Mr. Baro: Well, I was willing for you to question me about it before. I was waiting for you to question me after Mr. Gerstein finished, but you never did.

Mr. Swan: I am sorry. You have never been questioned by us?

Mr. Baro: No, sir, I haven't.

Mr. Swan: Mr. Baro, do you have such an opinion as you could not be swayed by the evidence?

Mr. Baro: Yes, I have.

Mr. Swan: By the evidence?

Mr. Baro: Yes, I have.

Mr. Swan: You have such an opinion that the

evidence in this case would not cause you to change your opinion?

Mr. Baro: It wouldn't change my opinion.

Mr. Swan: I challenge for cause, if the Court please.

The Court: All right. Step down.

Mr. Swan: Thank you, Mr. Baro. I am sorry. (The juror was excused.) (286)

* * *

Mr. Gerstein: Now, there has been considerable publicity in this case, but in spite of that, the opinion which you form must be formed only from what you hear from this (287) witness stand and not from any other outside influence.

You understand that?

Mr. Rosner: Yes, sir.

Mr. Gerstein: And you must base your verdict only on what comes from the witness stand.

Mr. Rosner: Witness stand.

Mr. Gerstein: Do you know of any reason why you can't give a fair trial to this defendant and to the people of the State of Florida?

Mr. Rosner: No. (288)

* * *

Mr. Swan: Have you formed or expressed any opinion as to the guilt or innocence of this boy?

Mr. Rosner: No.

Mr. Swan: Not at all?

Mr. Rosner: No.

Mr. Swan: I was coming down the line here.

Mr. O'Shaughnessy, you have not?

Mr. O'Shaughnessy: No.

Mr. Swan: Have you any fixed opinion as to the guilt or innocence of this defendant? (288)

Mr. O'Shaughnessy: No.

Mr. Swan: Is that correct?

Mr. O'Shaughnessy: Yes. (289)

Mr. Swan: All right. I believe — I am not sure. Did I ask you whether you had formed or expressed an opinion as to the guilt or innocence of this boy?

Mr. Rosner: Never spoke to anybody about it.

Mr. Swan: And you have not formed in your own mind an opinion or expressed it?

Mr. Rosner: I don't know the details about it.

Mr. Swan: All right.

Lady and gentlemen of the jury, of the prospective jury, under your oath you will not be influenced by anything on the outside of this case; is that correct?

The Jurors: Yes sir. (291)